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SPEAKERS

Student, Justin Pearson, Connor (student), Josh Windham, Andrew Hessick

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J **Justin Pearson** 00:24

Hello Carolina Law! That's right, we're recording this podcast episode live in Chapel Hill at the University of North Carolina School of Law. This is our seventh annual IJ-UNC-Fed Soc SCOTUS term preview, and we are thrilled to be back here in Chapel Hill. My name is Justin Pearson. Among other things, I'm IJ's managing attorney of our Florida office down in Miami, but like all lawyers at IJ, I litigate across the United States. And just so you guys know a little bit about IJ, we are the nation's largest, philosophically libertarian, public interest law firm. So what that means is that we're nonpartisan, and we're pretty big -- up to about 160 people in six offices, we don't usually sue for money, other than maybe to get our clients money back from the police, and we never charge our clients a penny -- all of our salaries are paid for by over 10,000 donors. So instead, what my colleagues and I do is we go around the nation representing people pro bono to get judges to throw out unconstitutional laws. It is a lot of fun, and we're very good at what we do, if I do say so myself. We've had ten US Supreme Court cases and we've won eight of them. We love con law, we track the Supreme Court's decisions very closely, and so we always look forward to this event today. And if you're as interested in con law and the Supreme Court as I am, then I would recommend that you look at our website ij.org and consider applying for a job at IJ. We have an amazing summer intern program for law students called the Dave Kennedy Fellows. It's paid, but even more than being paid it's just an incredible program; we bring in scholars and judges and experts to help train you in addition to getting to work with IJ constitutional lawyers. You can find out more information about that on ij.org. Just so you know, for the Dave Kennedy Fellows, the application page will go live in mid October, and then we conduct interviews on a rolling basis in November, December and January, so don't wait to get those in. And if you're you know already a 3L or you've already graduated, we have openings for people like you as well; we have postgraduate fellowships called Litigation Fellowships that last two years. We also have Bingham Fellowships, which, if you're doing two different judicial clerkships and you have a gap year, the Bingham fellowship can fill that gap year at IJ. And we actually have permanent attorney positions where we're hiring people; both our Austin Texas office and our headquarters up in Arlington, Virginia are both expanding and hiring more attorneys. So again, you can find out all that information about those openings at ij.org. But now let's talk about this event, today. I am joined by two fantastic panelists. As has been the case for many years now, one of the panelists is Professor Andrew Hessick; I'm so happy to have him back, he always does an extremely terrific job. Professor

Hessick, as hopefully many of you know, is the Judge John J. Parker, Distinguished Professor of Law and Associate Dean for Strategy and Planning here at UNC Law. Before that fancy title many years ago, Professor Hessick went to Yale Law School where he was an editor of the Yale Law Journal. He clerked for two different federal appellate judges: Judge Reena Raggi on the Second Circuit and Judge Randolph on the DC Circuit. He was also a Bristow Fellow at the US Solicitor General's office. And Professor Hessick has always done a great job on this panel so he should have felt pretty confident that he'd be invited back, but I think he wanted to boost his chances so he did something to really put it over the top -- he got a cert grant in one of his cases. So one of his cases will be argued at the US Supreme Court this docket. Professor, do you want to talk a little bit about the UNC Supreme Court program and that case?

A Andrew Hessick 03:00

Yeah. Thanks, Justin. And thanks for having me on the panel. And hi, Josh. Yeah, so the UNC Supreme Court program, we started it two years ago. It's a course that we offer all year where students help me and my colleague represent clients before the US Supreme Court. We've worked on amicus and merits briefs and we've filed several petitions. This is our first petition that we filed in the in the McElrath Case, and the court granted it at the end of last term.

J Justin Pearson 04:37

That's fantastic. It's a question regarding the Fifth Amendment that I think you are sure to win so, well done and I look forward to celebrating your victory.

A Andrew Hessick 04:47

Justin can't take it back now, it's on this podcast.

J Justin Pearson 04:49

I don't want to go too far off on a tangent, but I like your chances. Our other fantastic panelist is here for the first time but he knows this law school well -- it's my colleague, Josh Windham. Josh is an IJ attorney, and he's also IJ's Elfie Gallun Fellow in Freedom and the Constitution. Josh has litigated constitutional law cases all across the US; most of his cases have involved either economic liberty or property rights. Among other victories, he victoriously argued at the Pennsylvania State Supreme Court not that long ago that the Pennsylvania constitution provides greater protection for economic liberty than the US Constitution, which is probably one of the most important economic liberty decisions of the last couple decades. He's also one of IJ's leading experts (which is really saying something) in the Fourth Amendment in general, and the Open Fields Doctrine in particular. But perhaps most importantly, he is a UNC Law School alumnus.

J Josh Windham 05:50

You know, Justin, that this podcast started recording here, right after I left. So I like to think I made a huge impact on history.

made a huge impact on history.

J Justin Pearson 05:59

Well, you may have, you could tell us how involved you are. But just to be clear, not only did Josh go to law school here, he was the president of this very Federal Society chapter. So Josh, how's it feel to be back at your old stomping grounds?

J Josh Windham 06:11

I feel like I'm a student again, it's pretty surreal.

J Justin Pearson 06:15

Okay, so here's how this is going to work: We're going to start off with just a few minutes of trivia, where I'm going to ask Josh and Professor Hessick some questions about cases that are on the docket for this term. After that, both Professor Hessick and Josh are going to present a case that they would like to talk about at length. After that, they'll each present a pending cert petition. And then my favorite part is at the end; we should have about 10 to 15 minutes of Q&A, when anyone in the audience can ask any questions they like about either anything we talked about or anything we didn't talk about. So, Professor, although you try to be humble, I remember you doing extremely well during past trivia rounds. So I'm going to call you the defending champion and say you get to choose whether you want to go first or second.

A Andrew Hessick 07:00

I will go second.

J Justin Pearson 07:03

So the way this works is we'll have a few rounds. During each round, I'll ask one question to each of the contestants. If they get it right, they get one point. If they get it wrong, it goes the other person to try to steal that point. If they both get it wrong, obviously nobody gets the point.

J Josh Windham 07:16

What do we win?

J Justin Pearson 07:17

My respect. All right. Now, for those of you listening at home, I have a clear bag with crumpled up papers with the different questions so it's totally random. Some of the questions are hard, some are easy, you get what you get, it's not my fault. All right, here we go. Josh, are you

some are easy, you get what you get, it's not my fault. All right, here we go. Josh, are you ready?

J Josh Windham 07:38

As I'll ever be.

J Justin Pearson 07:39

All right. Josh, your first question is about Culley vs Marshall, which involves something that you and I both dislike immensely called civil forfeiture. As you know, unlike criminal forfeiture, civil forfeiture allows law enforcement officers to seize innocent peoples' property and keep it for themselves. In most civil forfeiture cases, the property owner was never even accused of a crime, let alone convicted of anything. One of the law enforcement tactics is to delay things for as long as possible after it seizes the property in order to force the innocent owner to reach a compromise settlement in order to get part of their money or property back. Here, Culley vs Marshall, the case where they're holding property for well over a year without any type of post seizure probable cause hearing, violates the 14th amendment's due process clause. Here's my question: What was the type of property at issue?

J Josh Windham 08:34

A car.

J Justin Pearson 08:35

That is correct. Well done Josh, it was a car. And that's actually a very common type of property to be subject to civil forfeiture. What will often happen is someone will lend their car to someone else, that person will be suspected of doing something suspicious, so then the property owner will go to get their car back from the police and police will say, "oh, no, yeah, we understand you did absolutely nothing wrong. But this is a very naughty car, and so now belongs to us."

J Josh Windham 09:04

And the Institute for Justice actually had a win recently in the Sixth Circuit on this issue in Ingram vs Wayne County. So if you want to look it up, Judge Thapar had a really interesting concurrence on the original public meaning of due process, so check it out.

09:18

Absolutely. All right, Professor, Josh is off to a good start. Can you keep pace?

A Andrew Hessick 09:22

That's terrifying.

J Justin Pearson 09:23

I mean, you should be proud of him, he's UNC Law School grad. All right, Professor. This term, the court will have two cases about what happens when public officials use their personal social media accounts to send out information about their government positions, but then block some members of the public. These cases are Lindke vs Freed, and O'Connor Ratcliff vs Garnier. But this is not the first time that the court has granted cert for this type of issue. In 2021, the Supreme Court dismissed a similar case involving President Trump's Twitter feed for being moot once he was no longer president. Interestingly, Linkde's cert petition argues that there is no risk of a similar mootness problem. Why does the petitioner in Linkde vs Freed claim that there is zero risk of his case becoming moot?

A Andrew Hessick 10:14

I'm guessing here, but I'm gonna go with because he's requesting retrospective relief damages.

J Justin Pearson 10:28

That is exactly right, well done. Yeah, unlike the Trump case, where they were seeking for relief in the form of declaratory injunctive relief, Linkde is seeking backward looking relief in the form of nomina, actual and punitive damages. And so even if the public official were to stop being a public official, he would still have his case over whether he should get damages. Great job, Professor, you get a point as well.

J Josh Windham 10:42

Now I'm intimidated.

J Justin Pearson 10:43

All right Josh, let's see if you can keep it going. Okay, Josh, this question is about Moore vs United States, which involves a Sixteenth Amendment challenge. The petitioners invested in a startup that went on to become extremely profitable, but they don't want to pay any of the resulting taxes. Rounding to the nearest million dollars, how much have the petitioners received in dividend payments from their investment in the company?

J Josh Windham 11:13

Zero.

Justin Pearson 11:14

That is correct. Zero dollars, right.The company was formed in order to provide affordable farming equipment to rural farmers in India, and it's a for profit company, but they knew that there would never be any dividend distributions. And so no money has been paid out to the owners or the investors at all. But because the company has done well and has grown, it's gone up in value. And so the government claims that these investors who have received no money back need to pay taxes on the increase. The Ninth Circuit agreed with the government. I think the Supreme Court might rule differently.

Josh Windham 11:46

Justin's making all sorts of predictions today.

Justin Pearson 11:48

I don't know what got into me, I just had some coffee. All right. Here we go, Professor. Can you keep the streak going? All right, Professor, we have an appropriations clause case. It's called Consumer Financial Protection Bureau vs Community Financial Services Association of America limited. It's about the CFPB. The Fifth Circuit held that the funding mechanism for the CFPB was unconstitutional, because it allowed CFPB's director to unilaterally decide what its budget should be, and then directly take the money from where?

Andrew Hessick 12:26

I think it got money from the Federal Reserve. That is correct. Congress said that not only could CFPB set its own budget, it could then take the money directly from the Federal Reserve. They did technically put a limit on how much they could take, but it's so high they'd never even come close to reaching it. And that's not because they've been disciplined -- they take extra money every year. And so now the CFPB has this war chest of money in reserve, just in case Congress ever decides to put some sort of limit on them. All right. Let's just do one more round. You each are at two points, so we might end up with a tie. Let's see if you can keep this going. All right, Josh, here's your final question. Yet again, this term, the court will consider whether the federal government can meet its requirement to provide an immigration hearing notice, by sending out the information piecemeal instead of all on one hearing notice. In Campos-Chavez vs Garland, please name the two pieces of information that the government failed to provide on its supposed hearing notice.

Josh Windham 13:46

It's either date and time or time and place. Time and place?

13:49

Time and place is correct. Now, I'm sorry, if you if you send out a hearing notice that doesn't

say the time or the place of the hearing, that is not a hearing notice. But that's what the government's been doing, because the date that they send out the hearing notice triggers all sorts of other statutory things, and when time gets told and stuff like that. So what they've basically been doing is sending out something that says it's a hearing notice that isn't actually hearing notice and then they actually send out that other information later. This is actually just the latest in a string of cases where the Supreme Court has consistently ruled against the federal government for its failure to put all the information on a hearing notice and I think the same thing will happen again. So I might as well make that prediction since I seem to be in a predicting mood today.

J Josh Windham 14:31

Somebody should keep track of whether Justin's right or wrong. He'll get an email in like a year and a half.

J Justin Pearson 14:36

It's so much easier to make the predictions than to follow up on them. All right. Josh, you went three for three. Well done. All right, Professor, let's see if you can match him. Penalty kicks. I should have made these harder, I obviously made these way too easy. All right, Professor. The court has another case about trademarks and the First Amendment this term in Vidal vs Elster. What is the phrase that the Court of Appeals for the Federal Circuit said could be trademarked?

A Andrew Hessick 15:05

Is that "Trump too small"?

15:07

"Trump too small" is correct, right. So I am going to make these questions harder next time, I promise. Yeah, so the Lanham Act prohibits trademarking phrases about living individuals without their written consent. But the Federal Circuit held that applying this law to speech about public officials violated the First Amendment. So you guys, you both went three for three, can we get a round of applause here? Great job, both of you. And so now we're to the point where the two panelists will each present a case on the docket that they would like to talk about, who'd like to go first?

J Josh Windham 15:42

I'm happy to go first.

J Justin Pearson 15:43

Go ahead, Josh, and which case are you presenting?

Josh Windham 15:45

United States versus Rahimi. And so this is a Second Amendment case out of the Fifth Circuit. And before I get started on this, I want to recognize that the topic of guns and gun violence is an especially fraught one, of course, and given the recent tragedy here on this campus, I think it becomes even more sensitive. So I just want to make clear that one, I recognize that, and two, IJ doesn't do any Second Amendment litigation, so don't take anything I say today as a reflection on our views of the matter. So my goal really is to just explain what the case is about and offer a few thoughts on some of the legal issues at play. So in 2020, a man named Rahimi was accused of assaulting his ex girlfriend, and a court found that he posed a threat of violence to her. He then entered into an agreed domestic violence restraining order, and as part of that order he was prohibited from possessing any guns. He proceeded to violate that order. Within a few months, he assaulted another woman with a gun and was prosecuted for that. And then a few months after that, he was involved in five consecutive shooting incidents. And to quote the Fifth Circuit summary of this, I think it's revealing: "On December first, after selling narcotics to an individual he fired multiple shots into that person's residence. The following day, Rahimi was involved in a car accident; he exited his vehicle shot at the other driver and fled the scene. He returned to the scene in a different vehicle and shot at the other driver's car. On December 22nd, Rahimi shot at a constable's vehicle. On January 7th, Rahimi fired multiple shots in the air after his friend's credit card was declined at a Whataburger." So following all that, Rahimi was arrested and police searched his home, where they found several weapons and a copy of the domestic violence restraining order that barred him from possessing guns. He was then prosecuted under 18 USC Section 922 G8 for violating that order. He moved to dismiss arguing the statute was unconstitutional under the Second Amendment, that violated his right to keep arms. And the Fifth Circuit had previously upheld this statute under the Second Amendment, but that was before the Supreme Court's decision last year in Bruen, which announced a new framework for deciding whether firearms restrictions violate the Second Amendment. Now, the old framework had two steps: Does the Second Amendment apply on its plain text? And if so, does the challenge law satisfy some kind of means and scrutiny? And it depends on the case, but it's either going to be strict or intermediate scrutiny. Now, Bruen rejected step two, and held that there's really only one question in these cases -- when the plain text of the Second Amendment appears to cover the conduct at issue, like Rahimi's right to keep arms, and I'll just quote, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right." So no more means end scrutiny, courts conduct a purely textual and historical analysis now in this context. And if the government can't point to historical analog for its regulation, the regulation is unconstitutional under Bruen. There's one wrinkle, which we'll return to in a little bit, but in Bruen and in Heller before that, the court had noted that the Second Amendment protects "responsible, law abiding citizens" and Bruen didn't really clarify how that qualifier factored into its new tests, or at least I don't think it did. And so before making its historical showing, the government has to make a preliminary argument (or at least it does in this case) before the Fifth Circuit, that Rahimi wasn't a "responsible, law abiding citizen." And so his argument should fail out of the jump, right? The Fifth Circuit sort of brushes that aside, "the Supreme Court couldn't have meant law abiding literally," it says, because that would mean that speeding tickets would remove your Second Amendment rights -- any kind of minor violation of a law would mean you're outside the bounds of the Second Amendment, and that's a sort of absurd outcome, right? So the Fifth Circuit says that the qualifier was really just meant as an expression of its demand for historical analog, because at the founding, for example, there were laws that prohibited things like felons possessing firearms, the mentally ill possessing firearms. So the

Fifth Circuit says the phrase "responsible law abiding" is really just sort of a head nod to those kinds of historical laws. That brings us to the core of the case. The Fifth Circuit marches through all of the government's historical evidence that there's an analogue for Section 922 G8, and there's a ton of examples in the opinions so I just don't want to go through all of those, but I'll give two representative ones. So the first one that I want to cover is the government points to the common law offense of "going armed to terrify the king's subject." So that was a crime, it was codified in some founding eras state codes: Massachusetts, New Hampshire, North Carolina, Virginia. But the Fifth Circuit distinguishes those early statutes for various and I think often granular reasons: Those old statutes were focused on threats to the general public rather than threats to specific individuals; Some of the statutes authorized incarceration right, but not forfeiture, and those who did authorize forfeiture only did so after a criminal conviction as opposed to 922 GAA, which applies only to civil orders, right. So here are the various distinctions the Fifth Circuit relies on to say that's not a that's not an analog. Okay, so the government tries something else -- it points to historical surety laws, a common law under which individuals could show that they had just caused a fear that another person was going to hurt them or destroy their property. And if they could show that, they could demand surety of peace against that person, which was a way of saying "you have to basically post a bond that you're not going to hurt me," and if you don't post the bond, then you're disarmed effectively. Lots of states adopted these sorts of laws around the time the Bill of Rights was adopted, but the Fifth Circuit says that those are distinguishable too, because the supposedly dangerous person could just keep their weapons by posting some money. And so that's not true under this order -- Rahimi is forbidden from owning weapons at all. So those are two kind of examples of the way that this circuit distinguishes historical analogues. So in some, even though there were some founding era laws that authorize the government to disarm violent people, because none of those laws in the Fifth Circuit's mind bore all the salient features of 922 G8 at the same time, there wasn't a "relevantly similar historical analog," and so 922 G8 violates the Second Amendment. I think it's worth noting that the Fifth Circuit panel seems pretty frustrated with the Bruen case in this decision. The Court starts its opinion by stressing that "our job is not to weigh in on whether the statutes are good idea. We're not doing policymaking here. We're just trying to follow the Supreme Court's instructions." So that's the first thing it says, and the very last thing it says is "look, we held this statute was constitutional under means and scrutiny before Bruen, right, so we're only doing something different here because of Bruen" -- sort of pointing fingers at the Supreme Court, the way I read it. So that's the case in a nutshell, and I set it off for a couple of thoughts on it. I have two basic takes, both of them fairly skeptical. The first is that this case is a perfect example of why I am skeptical of history and tradition framework. At its core, I think the test is a kind of historical, statutory counting exercise: we go back in time, we look at some of the laws that happened to be on the books around the time of the founding, and then we just sort of take these laws as implicit restrictions on people's constitutional rights. I just don't see how that makes any sense, and maybe I'm a weirdo. But for one, we fought a revolution to start a new country with a new government with a new legal system, precisely because the old system didn't adequately protect our rights. So I just don't grasp, and I really never have grasped why we would look at founding era statutes as a measure of our constitutional rights. Another point I want to make is that (and again, I'm probably in the minority here) but you just can't get away from the fact that government is a philosophical achievement and rights are philosophical concepts. And for me, that has a pretty big bearing on how you should read provisions like the Second Amendment. The point of having rights is so that we can pursue our happiness free from coercion as long as we aren't hurting other people, in general. The Constitution says in the preamble -- what are we doing here? What's this about? Ensuring domestic tranquility, securing the blessings of liberty, right? That's the point of this whole exercise. But Rahimi is a violent and dangerous person, he's a threat to everybody around him, and I think allowing unhinged people like him to own guns is not

compatible with the goals that are set out in the Constitution. Nobody is safe and nobody's rights are secure if the Rahimis of the world are allowed to own guns, at least that's my view. And if we take the concept of a right to keep guns seriously, I think Rahimi by his actions has forfeited those rights. By the way, maybe all this is taken care of by that line and Bruen, the caveat that says the Second Amendment only protects responsible law abiding people. That's a fair reading of that, that's how I read it. The Fifth Circuit doesn't agree. But we'll have to agree to disagree on that and see what the Supreme Court says about it. The other point I wanted to make is a little bit less pointed than the kind of guns blazing approach that I just took. I wasn't really persuaded by the Fifth Circuit's application of the history and tradition test. You know, Bruen made clear that the government doesn't need to identify what it called a "historical twin" to justify modern gun regulation. That seems to be precisely what the Fifth Circuit did here. There were founding era laws that authorize the government to disarm whole classes of people that pose threats to society as a whole. And there were laws that authorized the government to disarm individual people through a civil procedure, though the defendant could keep his guns by paying surety. I think the Fifth Circuit's problem is that you didn't have all the elements of ease in the same kind of analogical package, but that just seems to fly in the face of what the Supreme Court said to us in Bruen that you don't have to find a historical twin to show that there's an analog. That's precisely the point that the Solicitor General made in her cert petition, just to give her credit on that. But I've talked for a while about about this, I'm happy to pass the baton to my esteemed colleague and maybe receive some more level headed commentary.

J Justin Pearson 25:25

Great job, Josh. Hopefully it'll prompt some questions when we get to the Q&A part. Professor, which case are you presenting?

J Josh Windham 25:31

I'm going to talk about Acheson Hotels vs Laufer. So this is an Article Three standing case, one of the areas of law that the court really likes to tinker with a lot. So Deborah Laufer is disabled, she has trouble walking, she has vision impairment, and she can't use her hands very well -- so serious disabilities. And she spends a bunch of her time combing websites of businesses looking for violations of the American with Disabilities Act. Now, the ADA, as you probably know, it prohibits places of public accommodations like hotels, from discriminating against people with disabilities. And it requires them to provide reasonable accommodations for disabilities. And it also delegates to the Attorney General the ability to promulgate regulations to enforce this statute. And one of the rules promulgated by the Attorney General says that hotels on the reservation system have to provide information about the accommodations available at their hotels. And that rule makes a good deal of sense -- it's so that people with disabilities, when they're reserving a room, they can figure out whether or not there's the kind of accommodation that they need in order to be able to stay in the room comfortably. Now, the statute also confers a private cause of action and the regulation also recognizes that private cause of action, so individuals can sue if the statute's violated. Now, Laufer, she sued under these provisions. She sued a bunch of hotels, actually, because that's what she does: she goes to the websites, and she looks to see which ones aren't providing this information, seeking prospective relief, injunctive relief, declaratory relief, but most importantly, probably in terms of why this litigation is happening, she sees attorney's fees. Now, here's the trick, though -- she has no intention of actually making reservations, she has no desire to go to these hotels, she's

just going on to the websites to see if they're violating the ADA requirements, right? So she's a tester, as we say, and that causes a potential standing problem. So standing is an Article Three doctrine that enforces the cases or controversies provision of Article Three; it says "The federal courts can hear only cases or controversies." And so the plaintiff who bring suit has to have "standing." The basic requirement under current doctrine is that the plaintiff has to allege some sort of injury in fact. Typically, it's something like getting physically hurt, cut, losing money, etc. What's clearly not enough, as of a few terms ago, is for the plaintiff to allege that the defendant has violated plaintiff's right, and that the plaintiff has a cause of action. If that were the standard it'd be pretty easy, because we'd have this statute here conferring a right and there was a violation, and the plaintiff would have standing based on that. But the Supreme Court said, "No, that's not going to do; you have to show some sort of factual injury, though, we can look to the law to figure out what what constitutes a factual injury." So now we have to ask, has she suffered relevant kind of factual injury? Well, she has suffered some injury, but it's it's pretty small, it's pretty amorphous. She didn't get information; she's going on these websites and the information isn't there that's supposed to be there. But not getting the information didn't really hurt her because she doesn't intend on making these reservations. She is just sort of deprived of the experience of having the hotel put up the accommodation information. So that doesn't seem like much of an injury. But there are several cases in the past several decisions that that would support standing in a case like this. One of them is this case Havens Realty from 1982, which is actually pretty similar. There, it was a Black plaintiff inquiring about renting an apartment, and even though the plaintiff had no desire, no intention of actually renting an apartment, they were just testing, inquiring if there were apartments available to see if there'd be racial discrimination. And the court said yes, you have standing right when they when they discriminated against you. So that's, that seems pretty similar. Another case, in which the court found standing that's pretty similar is FEC versus Akins. That case, and there's there's a predecessor case that's pretty similar, said just sheer deprivation of information can be an injury in fact sufficient for standing, if there's a statute that entitles you to that information. So those two cases right, the Havens Realty case and the Akins case, they they seem to support standing. But these are older cases, and these decisions have kind of been put in doubt because of more recent decisions from 2016, and then I think 2021. One of them, the 2016 decision is Spokeo, which said that having incorrect information on a credit profile is not a sufficient injury in fact. So there clearly was some sort of injury there, and they said, "oh, that that's not good enough, it's not cognizable." And then later, in this case TransUnion, the court said, among other things, that failure to follow procedures to keep your information safe, also is not a cognizable injury, even though that also is some sort of injury. So what these are suggesting is that the court is cutting back on the types of factual injuries that will support standing. And one of the things that the courts have been looking to that is very similar to the Second Amendment context is common law analogs -- they say, did we recognize this kind of harm back in the past? And if we didn't, then it's not going to be good enough. And it's hard to find an exact common law analog for the kind of injury alleged here, and the fact that that cert was granted, when they found standing below sort of suggests that the court is going to continue in its trend in this direction of limiting standing. Now, I do want to say one more thing before I finish up with this case, and it's a thing about mootness. So after cert was granted, the plaintiff dismissed some of her suits. And in other of the suits, the hotel was sold to another person or the interests were dissolved -- all sorts of things happened that rendered the case potentially moot. And there's been actually quite a bit of hand wringing over the whether the actions are moot and whether it fits within some sort of exception, like the capable of repetition, yet evading review or voluntary cessation, and whether the plaintiff is just basically trying to game the system. I don't think that there's really a problem here. I think that if the court wants to decide this issue, and I think it probably does want to decide this issue, it'll just decide this issue. And that's because even if we assume this case is moot, we have to

remember mootness just precludes ruling on the merits, and the question this case is whether there is standing, whether there was a case in controversy in the first place. Mootness would take away the case or controversy; standing is whether it was there in the first place. The court is allowed to address the standing issue, even if the case is moot. There's a decision from 1999 called Rogerus where they said that the order of operations for jurisdictional questions just doesn't matter. You can decide them in any order you want. So given that the court took the case, that they continued briefing and said go ahead and address mootness if you want to, I really think that there's a decent chance that they're going to address the standing question. Can I add some color to just some of the things you just said, just so that folks know? I mean, this case makes me chuckle for many reasons. But this lady is somewhat of a piece of work. I mean, the circuit splitting this issue is comprised of cases involving her. I mean, all the case names are her names in the case.

J Justin Pearson 34:18

And I mean to be fair, at IJ we've created our own circuit splits before too...

J Josh Windham 34:25

But on behalf of real people who had real things in the real world that were affecting them. I mean, this lady is a professional plaintiff in sort of like the purest sense of that term. Just two little factual details: During the case, the trial court offered her an opportunity to amend her complaint to clarify that she did intend to go to this hotel. She that she did that, and then an argument before the First Circuit she disclaimed that and said "actually, no, I don't intend to go there, nevermind." And then the hotel, during the litigation, posted the required notice on his website and said, "In fact, we have no ADA compliant rooms here, and so you have the information you need to decide if you want to come to our hotel or no." Like, they did the thing that the statute requires, right? And yet the case is, according to her, not moot because well, Expedia, and all these third party websites haven't changed their information, even though they're not defendants before the court. So it's just kind of shocking. I never understood injury in fact. Like, why is it called injury in fact -- why use this bizarre term of art? Until I read this case, and I was like, there's not a fact here that affects you. Now I get injury in fact: facts matter.

J Justin Pearson 35:34

Well done, guys. Alright, so now we're going to turn to the cert petition presentations. Now, just so everyone here knows, hopefully you already know: cert petitions are always long shots. On average, the court grants about 1% of them, if we take out the pro se petitions, it goes up to about 2%. Although that number is going down, I checked yesterday and so far, the courts only granted cert for 22 cases for this docket. Now that will go up; when it's all said and done, this docket will probably have about 60 cases or so. But even that continues kind of this long term trend of the court taking fewer and fewer cases every year. And it's not because there are fewer cert-worthy cases out there. But that's a discussion for a different time. So these are always long shots, but sometimes, you know, some shots aren't as long as others. And our two panelists have some cert petitions that they think are either especially interesting or might have a decent shot to get granted. Josh, take it away.

Josh Windham 36:24

Yeah, both about the Fourth Amendment, by the way. So the one I picked is called Jackson vs Ohio. And this one jumped out to me because, as Justin mentioned, a lot of my cases have to do with the Fourth Amendment and government searches, and I found the Ohio Supreme Court's decision here pretty odd. So, just so to run through the facts, and then I'll cover what happened. So basically, this guy named Jackie Jackson was pulled over for a supposed window tinting violation, when the officers in fact did not have a window tint meter and never intended to test his car and didn't in fact, test his car. So that's kind of bizarre to me. But they pulled him over, they asked for his ID, they asked for him to turn his car off and remove the key. And I guess the justices kind of dispute whether he was obstinent, but at the very least, he initially was a bit, you know, refusing about the whole thing. He started to film the cops at one point rather than handing over his ID. And then the officer said, okay, we'd like you to get out of your car and handed us your ID. And there's a US Supreme Court decision out of Pennsylvania from the 70s called Mimms that says police officers can order drivers to get out of their cars during traffic stops as a sort of safety matter, which is going to come up again in a second. And so the officer said "get out of your car", he didn't comply, the officer pulled the door open, physically, and then he was ordered out of the car and got out. And then another officer on the scene kind of grabbed his shirt, not aggressively but just kind of like casually directed him to the back of the car. And the door was wide open. So another officer comes up at this point with a flashlight and goes to the open door and starts peering around inside and finds a joint on the floor of the car. And so the question in the case is did a search occur? And the reason that question matters here, is that in Carroll about 100 years ago, the US Supreme Court said, "Ah, you can search cars without a warrant, as long as you have probable cause to believe there's contraband inside." So the question is, did a search occur before or after they developed that probable cause when they saw the joint. So it's really a case dispositive issue. And so just to give you a conclusion to the facts, they searched the car, they found a bit of clothes in the back, they found a gun in the bin of clothes, and they searched the pockets of the clothes and found more marijuana. And so Jackson was prosecuted, and it's a motion to suppress case. And you know, if you've taken crim pro, you know that the Supreme Court has recognized two ways that the government can perform a search: the Katz and Jones tests. Under Katz, did they violate a reasonable expectation of privacy when trying to learn information? And then under Jones, did they trespass or physically intrude on your property when trying to learn information? So the Ohio Supreme Court said no search occurred here, and kind of broke it down into its constituent parts; so, did the first officer when he opened the door conduct a search? The court says no, because under Mimms, he wasn't trying to learn anything when he touched the car, he was just trying to, you know, secure the scene basically. So not a search there. And then when the second officer came by, did he perform a search? Well, no, because there's lots of US Supreme Court cases saying you don't have to shield your eyes when you're in a place you have a lawful right to be -- mere visual observation is not a search, basically. And so taking these two actions separately, we don't have a search. Justice Brunner dissents and frankly, she read my mind. So I'm just going to quote her here, she writes: "The majority opinion improperly isolates the actions of each officer involved in the stop. The majority doesn't take into consideration that these two officers were working together considered as a whole this course of conduct was not only a search, it was a fishing expedition, and not a constitutional law enforcement technique." I agree. But just to put it another way -- does anybody here watch football? Okay, so you know those replay moments when they slow things down so that you're looking at things like frame by frame by frame, and then you get these commentators who are like, "Ah, look there, the ball wiggled a little bit in his arm so that wasn't

a catch. Or look, he stepped like a millimeter of grass outside the line..." So there's something similar going on here when the Ohio Supreme Court kind of takes his hyper granular approach to what the police are doing and says "is each individual action considered in isolation a search" rather than sort of like playing things in real time and asking, what is actually going on here? The final point I'll make is that this is just a hyper technical way of thinking about the real world from the Ohio Supreme Courts perspective. If you just took a normal person who knew nothing about the Fourth Amendment, and the police pulled him over, and one person forced him out of his car, and then somebody else swooped in with a flashlight and started like peering into the car, I think that normal people would call that a search, right. That's how the word search has kind of always been used ever since the founding. That's how I feel about it, so I'll be curious to see if the Supreme Court takes this one up.

J Justin Pearson 41:18

Yeah, thanks. I completely agree. I think it's crazy that a court would say that two police officers can team up to do something lawfully, that would be a Fourth Amendment violation if either one of them did it entirely by themselves. It just doesn't make any sense. So I completely agree with what you said. Professor, which cert petition are you going to present?

A Andrew Hessick 41:35

Also a Fourth Amendment one. And yours is an outrage, but my mine just tops an outrage, I think, based on personal experience. It's Verdun versus San Diego. So this deals with chalking tires. So in an era before parking meters and park mobile and whatnot, police used to check if you were complying with parking time limitations by chalking your tires; they would mark you tires on the tread, and then they'd go and circulate and come back say an hour later, see if you have moved, maybe put a second mark on, then come back, and if you're still there then they're like, "oh, you violated the two hour limit," or if it's one hour limit is one mark, etc. So police used to do this all the time, and lots of places actually still do it. And that's because it's, it's cheap, right? It's really cheap. And San Diego still does it, and it marked for Verdun's car, and eventually gave him a ticket for not moving his car, for staying too long. So Verdun did what I only dreamed of when the cops did this to me when I was 16 and I was outraged -- he filed a class action. He brought an action under 1983. A 1983 action is when you sue a state official for violating your constitutional rights, and he said but chalking violates the Fourth Amendment. Now, personally, I'm like, this has all the merit in the world, right? Chalking is not a traditional search, but it seems like a search -- they're marking your property and then they're using that mark and looking at it to see to get some information about you. Sort of, maybe at 10 million feet, it's a little bit like putting a tracker on your car. So the question is whether this is reasonable. And in this case, the Ninth Circuit, they said, "yeah, it's fine." And they said it falls within the so-called "administrative search doctrine." And that exception says law enforcement can do searches to protect the public, for example, there have to be these these blanket searches. Right. So sobriety checkpoints or checkpoints for fugitives --these are the ones where you just get stopped on the road, and they just they're checking everyone. Now there are limits under this exception: it has to it has to be to protect the public, it can't be simply to enforce the law. So it's to keep drunk drivers off the road, it's not to to arrest drunk drivers. And it has to be conducted against everyone and it can't be overly intrusive. So it's this limited exception. And so in the Ninth Circuit's view, they said well, "the chalk mark is minimally intrusive, and it serves the public interest of preventing double parking and drivers

constantly circulating around." They didn't say the road rage from never being able to find a parking spot and going absolutely crazy, if you've lived in a big city, you know what I'm talking about. Look, this conclusion to me is far from obvious. Let's start with the interests of the state. Yes, chalking helps enforce the laws and, you know, and parking laws, they reduce double parking, etc... but that's because all laws serve some purpose. There is a reason why we have criminal laws, right? We don't enact criminal laws for no reason. So if we accept the rationale that they're just sort of like getting the benefits of enforcement, it would mean that the administrative search could be used to enforce any law, anytime. They're just like, "oh, well, enforcing the law is the interest, because every law has an interest underneath it." And as for the intrusiveness, right, is it is it overly intrusive? Yeah, it's only a chalk mark. But I'd pretty outraged if they chalk marked me or my clothes, or some of my other stuff. I think that with the cars, we think it's not particularly intrusive simply because we're used to it, right? People touch cars. I mean, I do think as a general matter, stepping way far back, that marking people and their things for purposes of law enforcement has a very bad history. So anyway, the Sixth Circuit, they agreed more with what I've said, though, not exactly the way I've said it. And so that created a split, which I think makes this case a decent chance for cert, even in the brief in opposition, they acknowledge the split, and they say, "oh, there's a split here is just that it's, it's not a not a really big one, you should let it percolate more," all the usual things which are much more on defense to avoid a cert grant.

J Josh Windham 46:22

So a couple of thoughts. First of all, I don't know that I share your outrage about tire chalking.

A Andrew Hessick 46:28

That's because you've never been chalked.

J Josh Windham 46:29

I know, I'm privileged in that way. So we took a look at this case, when it was originally decided and thought, you know, should we kind of just see if we can take that one over. Right, that kind of thing. And my thought was like, I don't know, man. The Fourth Amendment guarantees the right to be secure in your property. This is kind of a de minimis trespass on property.

A Andrew Hessick 46:55

Still a trespass.

J Josh Windham 46:59

I just don't know. The term security is a historical term that has norms associated and values associated with it. And the question is whether they have to get a warrant to do this. I don't know whether a warrant is required for this under the Fourth Amendment.

A Andrew Hessick 47:15

If you don't want to get a warrant, then use a parking meter, use something else.

J Josh Windham 47:19

Also, it's government property. Right? Out of curiosity? Do you know the facts of the case?

A Andrew Hessick 47:25

Wait, you mean, where the car was parked? Yeah.

J Josh Windham 47:30

I think they're keeping track of who's on government property, which I think is also a fact that might... anyway, I'm gonna squish.

J Justin Pearson 47:37

Now, I mean, these are fair points, even if I disagree with them. Now, we have a few minutes left for questions from the audience. The way this will work is, you know, you raise your hand, you say your question, I'll repeat it into the mic, and then one of our esteemed panelists will answer it. So come on UNC law students, do any of you have any questions? Yes, Connor.

C Connor (student) 47:57

In terms of tying in with the chalking type things, how do traffic camera cases work? Because there's some argument like traffic cameras are basically just a general warrant, but some of the arguments against it are that well it's civil, it's not even criminal, so the Fourth Amendment doesn't really apply. How does that fit in with parking? Is there an angle there?

J Josh Windham 48:17

Yeah, just to make sure I understand the question. So you're saying how to how do traffic cameras relate to the kind of legal issues in this case? Yeah, you know, it's an interesting question. I think this is a developing area of law right now, what kind of Fourth Amendment protection you are entitled to in public spaces. I think the Carpenter decision did a good job of kind of forging a new path here.

J Justin Pearson 48:42

It was an improvement to a degree.

J Josh Windham 48:45

You know, it's interesting, right? Because when you go out into public, there's an extent to which you're exposing yourself voluntarily to others, at least under under some ways of thinking about that. And so traffic cameras are just recording where you're going in public. Now, when does that become a Fourth Amendment violation? There's this kind of idea of a mosaic theory of the Fourth Amendment that once they've kind of painted a picture of your life, and they can point to like your life patterns and habits, then maybe it's a violation. I'll claim agnosticism on this right now, even though I actually have positions. But I think it's an emerging area of law, and there's not really clear answers quite yet.

A Andrew Hessick 49:16

Yeah, I do think it is a little different in that they're not intruding in your personal space right onto your property or yourself -- they are using cameras. Now, it raises still all sorts of issues, but it's different enough in kind, that I think they're separable.

J Justin Pearson 49:34

Any other questions from the audience? Yes, sir.

S Student 49:38

Josh, you mentioned being not convinced by the history and tradition kind of endeavor. And I'm just wondering what you think about getting the benefits of like judicial constraint and restraint from an originalist perspective versus the benefits of like that philosophical view that you talked about

J Josh Windham 49:57

So the question is, as I understand it, that Bruen and the history and tradition approach is attempting to make the judicial inquiry more objective, right? And so if we depart from that, or we do something different, how do we become more objective? I mean, ultimately, I think the history and tradition test is like any other legal test; it's sort of in the eye of the beholder, right? I mean, you can find anything you want in the annals of history. You can make history whatever you want it to be, ultimately. And I realized there were probably objective ways of doing history, there are objective ways of going about this inquiry. But the end of the day, you know, both sides of the argument in the Rahimi case seem like they had pretty good arguments, right. And so my point is simply that it is non objective to take the Second Amendment out of context and to drop its philosophical framing and the purpose of the Constitution that it is serving. It is not an objective way of thinking about any constitutional provision to treat its text in isolation.

J Justin Pearson 50:53

We have time for one final question. Yes, sir.

S Student 50:56

Does deciding against Laufer kill Havens Realty?

A Andrew Hessick 51:05

Yeah, the question is whether if the decision goes against Laufer and says that she has no standing, does that result necessarily in the overturning of Havens Realty. Um, I'm sure that an opinion could be written that preserves Havens to some degree. I don't know how compelling it would be, but it could be done. I guess I don't foresee the court doing it. Right now I think that they've been cutting back on standing quite a bit, and I think Havens could really be reduced a whole bunch. And so too with Akins, the information case.

J Josh Windham 51:53

I also thought just for what it's worth that that case was distinguishable. Because here the ADA says it's designed to ensure that people can get the information they need to access lodging, and she doesn't want to access lodging. Whereas in Havens Realty, the whole point of the thing was to just give you the information at all. So it felt like that was actually a basis for distinguishing the case.

A Andrew Hessick 52:15

I think it is a basis for distinguishing. I do think, though, that the injury is going to be the same in the information and that if we were really honest and step back and look at it and say that standing is based on injury and legal theories for the merits, then that's sort of more of a 12 B6 -- you're not the right person, and you weren't entitled to the information as opposed to a standing injury. But that said, totally possible that could distinguish that way because they do whatever they want when it comes to standing.

J Justin Pearson 52:41

Now that is unfortunately true, for better or worse. And so now that that brings us to the end of our podcast. Could we get one more round of applause for our great panelists? Thank you all very much.